

**BEFORE THE STATE DEPARTMENT OF EDUCATION**

**IN RE:** )  
 )  
**M.H.** )  
 )  
**v.** ) **No. 04-35**  
 )  
**Metropolitan Nashville Public Schools** ) **Thomas Jay Martin, Jr.**  
 **Administrative Law Judge**

**THE HEARING WAS HELD ON SEPTEMBER 13 & 14, 2004 IN NASHVILLE  
TENNESSEE**

**FINAL ORDER**

The matter comes before the Administrative Law Judge on September 13 and 14, 2004 upon a request for a due process hearing filed by the child's mother and custodial parent. David Brylawski, Julius Gallon, John Jackson M.D., and Diane Stark testified by deposition as agreed upon by the parties. These depositions have been read and reviewed by the Administration Law Judge. Each of the aforementioned witnesses provided credible testimony. The child's mother, Goodlettsville Middle School teacher Pattie Ownby, school district psychologist Terri Ashford, and 2003-2004 Goodlettsville Middle School Principal Dr. Barry Potts were called as witnesses by the child's attorney. The school district called district employees Barbara McCroskey, Linda Richards, Denise Rollins, and Cecilia Hampton as witnesses. These witnesses also provided believable testimony.

The parties agreed that there were two issues to be resolved.

### Issue #1

Is the child emotionally disturbed pursuant to IDEA? Was the child's behavior (possessing marijuana at school) a manifestation of his disability if emotionally disturbed?

There was a considerable amount of testimony proffered, in great detail, that illustrated the child's behaviors at school. Those behaviors were well documented by the school district personnel and there was little disagreement as to the child's behaviors while he was an eighth grade student at Goodlettsville Middle School during the 2003-2004 school year. The child's 2003-2004 attendance was regular until February 25, 2004 when he was caught by school administrators with marijuana on school premises during school hours. This particular behavior is a zero tolerance offense pursuant to school board policy. Unfortunately, he was expelled.

The child's requesting party has attached substantial significance to certain behaviors that caused the child to receive various disciplinary actions during the 2003-2004 school year. These behaviors generally include inappropriate physical touching of other students, refusal to complete assignments, excessive tardys to class, and lack of respect for authority. These were well documented by the testimony and written reports. School officials along with the mother and her advisors formulated an ongoing behavior plan to modify the child's behavior deficiencies in October 2003 and that plan was in existence on February 25, 2004.

In addition to considering the child's behaviors, the Court has also carefully reviewed and weighed the testimony of the professionals who provided differing opinions as to whether said child is emotionally disturbed pursuant to the federal law and state

definition. Dr. Jackson's opinion along with that of the school officials that the child is not emotionally disturbed pursuant to IDEA was given more weight than the opinions of David Brylawski and Diane Stark. The Court finds that the proof does not support the assertion that the child is emotionally disturbed as defined for IDEA eligibility purposes. The Court does believe that the child has experienced certain trauma in his life including abuse and homelessness that has caused the mother to seek mental health services for the child. Mental health providers have diagnosed the child as experiencing post traumatic stress disorder, oppositional defiant disorder, and attention deficit hyperactivity disorder. A child with these particular disorders is not necessarily a student who is also emotionally disturbed in educational terms and for educational purposes. The child was making appropriate educational progress considering his ability. His peer relationships were, for the most part, normal. The behavior problems he experienced were not of a marked degree or in a frequency or duration that would cause the Court to conclude that he is emotionally disturbed. To hold that the child suffers from emotional disturbance would be an injustice this Court is not willing to impose on this young man.

### **Issue #2**

Was the child's behavior i.e. (possessing marijuana on February 25, 2004 at school) a manifestation of his identified disability of attention deficit hyperactivity disorder?

In May, 2003 the child was identified by the school district as an attention deficit hyperactive disordered student. Although he did not receive any special education services as the 2003 school year ended, he became eligible for services at that time. In October 2004 an IEP was developed and the child began receiving special education

services. Along with the IEP, a behavior plan was devised and implemented by school officials to modify aforementioned behaviors said child exhibited from time to time at school. The mother was instrumental in obtaining special education services for the child and in causing the development of the behavior plan mentioned above.

The child exhibits many of the typical characteristics of ADHD children of his age and of his non-handicapped peers. He is impulsive, thoughtless at times, and acts without considering consequences. Although these behaviors appear to somewhat pervasive in school and at home they are not to a degree and severity that the Court can conclude that the student cannot control his behavior. As set out above, his behavior records were reviewed by counsel extensively throughout the hearing.

The student provides the case of Richland Sch. Dist. V. Thomas P., 2000 U.S. Dist. LEXIS 15162 (W.D. Wisc. 2000) that holds pursuant to 20 U.S.C. Sec. 1415(k)(6)(B)(i) the school system has the burden of proving that behavior subject to discipline is not a manifestation of child's disability.

The Court in Richland School District correctly points out that:

"A manifestation determination is by its very nature retrospective, for it looks back at the child's behavior and attempts to determine if the child's disability impaired his ability to understand and control his behavior. Although the IEP Team must also review the appropriateness of the IEP, that is only one part of the decision-making process described in the statute."

On the next page of the opinion the Court goes on to say that:

"The hearing officer's task is not simply to review the finding of the IEP Team; rather, he is to take the place of the IEP Team and make his own independent determination of whether the agency has shown that the child's behavior was a manifestation of his or her disability in accordance with §1415(k) (C)."

In this case from Wisconsin, the student presented credible expert testimony through a clinical psychologist that linked the behavior with the disability. Apparently, the district's evidence did not rise to the level of the clinical psychologist's testimony. The court said:

“The district did present some rebuttal evidence at the due process hearing through the testimony of school psychologist Pedersen, he did not conduct an evaluation of Peterson, did not offer any critique of Dr. Eisemann's diagnosis other than his opinion that she did not gather enough information, and he is not a clinical psychologist. Moreover, he was unable to offer any opinion on Dr. Eisemann's conclusion that Peterson suffers from a mood disorder.”

The Court in Richland School District determined that due to the expert testimony the school system failed to show the child's behavior i.e. (vandalism at school) was not a manifestation of his disability. That is not the testimony now before this Court.

The student relies on the testimony of Dr. Jackson taken by deposition to link his misbehavior (having drugs at school) to his ADHD disability.

Dr. Jackson's deposition on Page 20 lines 1-19:

“The idea that kids are – are bad, you know, I'm – I'm sort of – why would a kid do something that causes himself problems? I mean, is there innate badness to kids? Or is it parenting? Or is it, you know, experience? And – and so kids want to be happy; you and I want to be happy; everybody wants to be happy; and so it we're doing something that screws up happiness, something's gone wrong, you know, something's interfering with our happiness. And if it's us, then there's some drive; and what's caused that? Was it neglect? Was it abuse? Or what have you. That doesn't – doesn't justify sort of the ends, but it certainly does help us explain things a bit and maybe try to repair some of the earlier stuff, if possible, is – is the goal of psychiatry.

Question: Well, it sounds to me then there were – there could be lots of causes for current behavior that [REDACTED] exhibits?

Answer: Oh, I would say there are lots of causes for his current behavior.”

Dr. Jackson Page 23 lines 5-20:

Question: “The next sentence you – you state, “I strongly feel that [REDACTED] school functioning has been affected as a result of his experience of trauma.”

Answer: Yes.

Question: Explain that to me, please.

Answer: I think he’s hyperaroused from the trauma. I think that he meets criteria for ADHD, and I think that ADHD. the symptoms could be explained by a number of reasons: in utero substance exposure, neurochemical genetics from family members to trauma high anxiety states. And I think that his trauma has caused him to – to struggle with his attention issues. I think that he – a lot of his aggression has to do with his mood and his inability to face his trauma. So when’s he’s getting into trouble at school, I – I do believe it’s directly related to that.”

Dr. Jackson Page 51 lines 7-25, and Page 52 lines 1-2:

Question: “—of Exhibit 7. “Diagnostically, I view [REDACTED] as foll – as follows: ADHD, major depressive disorder without psychotic features, PTSD, and oppositional defiant disorder.”

Answer: Okay.

Question: Would you agree with that?

Answer: Major depression is one of those things where you need – it – it can be a two-week period of – of depressed mood. He probably gave some scales to help determine that. so at the time, I won’t argue with that. I think he’s got PTSD. He’s certainly oppisode – oppositional and bordering on conduct. I mean, there’s been a runaway, breaking into a house, and destroying

property. I mean, that – that’s three things, so it’s probably conduct disorder. And – but oppositional defiant kind of gets trumped by conduct once you get to a certain point. And the ADHD, he meets criteria. I feel like I’m treating anxiety and mood, or doing the best I can with it at this point, but there probably is an underlying ADHD also, so I think all of those diagnoses are pretty valid.”

Dr. Jackson Page 52 lines 11-25, Page 53 lines 1-5:

Answer: . “ODD would be a lesser form of conduct, so oppositional defiant would be he yells at, you know, parents, defies rules, and generally doesn’t cross the boundary of – of intrusion onto other people’s rights. Conduct just generally means you crossed the line a bit; you broke into a house. destroyed property, truant from school is one of the criteria, and so – setting fires, which isn’t him, animal cruelty. There’s a lot of other things that are –

Question: Possession of marijuana?

Answer: Breaking the law would be, probably. I don’t believe possession of marijuana is in there. I mean, that’s more of a substance disorder. And he would be abusing it, but I can’t really comment much more on what he’s doing with the marijuana because he doesn’t – you know, he says, “Well, I don’t do that anymore.” so I have to say, “Okay.” You know, I have to take people at their word, you know, if we don’t have the probation officer getting random urine drug screens, and so, you know, what am I going to do?”

Dr. Jackson in his deposition does not specifically opine that the student possessing marijuana at school is a manifestation of his ADHD disability. According to Dr. Jackson, this is a substance disorder.

The student also relies on the testimony of Diane Stark, a licensed social worker taken by deposition.

Diane J. Stark Page 34 lines 9-25, Page 35 lines 1-5:

Question: “Okay. And again, ADHD is, in itself, not a disability under IDEA; is that correct?

Answer: It's my understanding, again, having many ADHD youngsters who are certified as health impaired in our certified special ed, the way most of the systems seem to be doing it is, if, in fact, the needs can be met under a 504 plan, they do it 504.

But if the manifestations of the health impairment are so severe that that's not working, then they do go ahead and certify them special ed. So I have –

Question: Would you agree with me that simply because a student has been diagnosed as ADHD – as having ADHD – does not necessarily lend to – lead to a certification under IDEA?

Answer: I would agree that we don't – I'm sure that's right. We try not to do that unless it affects a student's behavior in the several domains of his life.

We use a very strict interpretation, like his ability to function with peers, with his class work, with authority figures in the home community, in which case [REDACTED] seems to meet all of those criteria.”

Diane Stark Page 125 lines 6-25 and Page 126 lines 1-17:

“And on a slightly different topic, after reviewing the medical and psychological records of [REDACTED] and the school disciplinary – disciplinary records, is it your opinion that [REDACTED] would or would not be able to control the behaviors that have resulted in his being disciplined and referred to the office?

Answer: I think he can't control it. Particularly in the overstimulating environments with the hall, gym, bus. Even in the classes with some of the teachers who seemed to like him and he liked, there's still some outbursts.

So I think that's a product of some condition that contributes to him – some condition or conditions that contribute to him being physically – I mean, rhetorically and verbally impulsive.

Question: And what kind of conditions might contribute to that?

Answer: ADHD, PTSD, severe anxiety, major depression, other kinds of undetected neurological issues.

Question: And based on your same review of the record, do you feel that [REDACTED] is able to understand the consequences of his behaviors?

Answer: Define what you mean by "consequences." In a moment, I don't feel like [REDACTED] is a child who is a planner. If he was a planner, the teachers would not have so many concerns. I think he is basically all impulse. I think at a time when he – he's settled – theoretically, when he's settled down with the person with whom he can talk and who can help him look at things and look through things, he probably, like anybody with his intelligence, can realize there's some things you shouldn't do and some things you should do, and this is what you have to do, this is what happens if you do this.

In terms of the spur-of-the-moment or the impulse, by the very definition of what I mean, he's not thinking these things through first."

Diane Stark Page 127 lines 18-25, Page 128 lines 1-25, and Page 129 lines 1-8:

Question: "The last discipline against [REDACTED] was on February 25<sup>th</sup>, 2004, for possession of marijuana at school. Would that kind of misconduct be within his control?

Answer: Looking at all the information, in the few times it's reported that he's doing what he's supposed to be doing when he's supposed to be doing it and on task, there may be that slim point in time where he would display the traits people want him to display, like not horseplaying, being timely, and planning. But the bulk of the time those skills have not been developed yet.

Question: So if a student asked him to hold an illegal substance, would his disability give him some difficulty in making a judgment about what to do then?

Answer: Well, since I've said, I think, consistently, that any time he's overstimulated and out and about and not being supervised and grounded, I think he's inordinately impulsive. I don't think he thinks.

I think it's a high probability – unless the situation is totally different – very, very high probability to consistently do everything else that he's asked.

Question: I didn't understand.

Answer: I think consistent with everything else that goes on with [REDACTED] with him grabbing students and him doing this and that with teachers watching, I think he is all impulse.

Question: And would that also be true of his ability to understand the consequences of possessing an illegal substance at school?

Answer: The way I've been describing [REDACTED] in the periods of time where the documented episodes of impulsive behavior are happening, by definition, the fact that it's an impulsive action, there's no delay, there's no processing, anticipating consequences – I'm sure, like all people, people of below-average intelligence, after something occurs with some trusted person, in processing, a person can be aware of consequences. But when an act is impulsive, there's no delay, there's no processing."

This testimony from Diane Stark is read in the light most favorable to the child so the interpretation by the Court is that the behavior (having marijuana at school) is a manifestation of the ADHD disability.

Further, the child relies on the deposition of David R. Brylawski, MSW Page 64 lines 8-14:

Question: "Okay. Did you see symptoms of [REDACTED] symptoms of ADHD in [REDACTED]"

Answer: Yes.

Question: And could you describe those, please?

Answer: Reported inattention and – and – looking back at some of the school notes too – inability to focus on tasks."

David Brylawski Page 64 lines 23-25 and Page 65 lines 1-3:

Question: “Okay. And how do either the ADHD or the depression affect his ability to function in school?”

Answer: Well, ADHD, those symptoms would make it very difficult to concentrate on tasks, and then in turn – and – and also control impulsivity and staying in his seat, and following teacher’s directions.”

David Brylawski Page 65 lines 16-25:

Question: “—and I need you to focus on [REDACTED] So what information do you have that ADHD affected his school functioning?”

Answer: Well, I think I need to go back and say that PTSD is a – is a kind of disorder that – that has – that sort of combines a lot of other different disorders; so to say that ADHD impedes his functioning, I think PTSD, which is my main focus with [REDACTED], has symptoms that – that – that emulate AT – ADHD and depressive disorders; so I put it all – I don’t make that distinction.”

Mr. Brylawski did not provide an opinion as to whether possessing marijuana at school was a manifestation of the child’s ADHD disability.

The school district submitted three cases to support their position. The cases AW, by his parents, Debra D. Wilson and Christopher D. Wilson v. Fairfax County School Board, Cite 372 F.3d674, No. 03-1181 (June 24, 2004), John Doe, by and through his parents and next friends and the class of all others similarly situated, Jane Doe, next friend and Joe Doe, next friend v. Board of Education of Oak Park & River Forest High School District 200, Nancy Smiley, Donald Offermann, Stephen C. Burner, both in their official capacities and as individuals, et al. Cite 115 F.3d 1273, No. 96-3014 (May 27, 1997), and Russell Farrin et al., v. Maine School Administrative District No. 59, Cite 165 F.Supp.2d 37, No. CIV. 01-43-B-S. (Oct. 10, 2001) were provided for the Court’s review.

This case like in AW, the school district officials conducted a manifestation determination meeting where it was determined that the student's behavior was not a manifestation of his disability. Also, like this case the student in AW suffered from ADHD. The student in AW sent a threatening note to another student although another student delivered the threatening note. The Court in AW concluded that the disciplined behavior required forethought. Likewise, the student in this matter possessed marijuana at school for some length of time which also required some ability to think beyond a mere impulse. Here, the marijuana was purchased at school and the student kept the contraband in his possession to take home to his brother after school. This type of behavior requires more than an impulse.

In Doe, a Seventh Circuit Court of Appeals decision, the 9<sup>th</sup> grade learning disabled student was expelled for possession of marijuana at a school dance. The Court of Appeals agreed with school officials that the student's misconduct in bringing marijuana to school was not a manifestation of his disability.

On Page 5 the Court quoted a Ninth Circuit decision:

“When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services—just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that is not so. Id. This part of the Ninth Circuit's opinion was left undisturbed by the Supreme Court on certiorari in Honig v. Doe.”

On Page 9 of the opinion the Court states that:

“Even if John had ADD or ADHD, this Court notes the testimony of witnesses at the hearings disclosing that John had control of his conduct when he knew the rules (R. 81, Ex. 3 at 282) and other evidence that John knew that OPRF prohibited possession of marijuana at school functions (e.g., R. 44, Exs. A and D). We agree with the Level I hearing officer and \*1282 the district court that John’s decision to bring marijuana to a school dance appears to have been calculated, rather than impulsive. As a result of all of these factors, there was little likelihood that an ADHD evaluation would have affected the outcome of the MDC’s determination that John’s misconduct was unrelated to his disability. See e.g., Doe v. Maher, 793 F.2d at 1480 n. 8 (a handicapped child’s misconduct is related to his handicap “only if the handicap significantly impairs the child’s behavioral controls).”

In Farrin, an eighth grade student, with a learning disability, was expelled for a drug violation. On Page 4 the Maine District Court said:

“Recognizing that schools have their own disciplinary rules applicable to all students, the IDEA also permits a school to discipline a child with a disability for more than ten days as it would discipline a non-disabled child, provided the disabled child’s misbehavior was not a “manifestation” of his disability. 20 U.S.C. § 1415(k)(5)(A).”

On Page 7 the opinion specifically spelled out the marijuana incident:

“31. On or about October 18, 2000, Jacob brought marijuana to school.

32. During a study period, Jacob arranged for another classmate to sell some of the marijuana to a third student.

33. Jacob gave the marijuana to the classmate, and the classmate, acting as a middleman, conducted the sale in a school bathroom.

34. Later, Jacob met the middleman in the bathroom and received \$4.50 in proceeds from the sale and the remainder of the marijuana from him.

35. The sequence of events, from bringing the marijuana to school to ultimately receiving the remainder of the marijuana and the sale proceeds, took place over the course of several hours.

36. The events of October 18<sup>th</sup> did not come to light for several weeks. They had not been revealed as of October 26<sup>th</sup>, the date that Jacob's PET addressed his academic troubles."

In this case we don't know as many facts as in Farrin. We do know that, by his own admission, the child purchased marijuana at school on February 25, 2004 and kept it on his person until the end of the school day. He purchased the marijuana for his brother. Again, this is more than an impulse type behavior. Like Doe and Farrin above the decision to purchase and possess marijuana for his brother was a calculated decision and not a result of his ADHD disability.

The Court gives greater weight to the testimony of the school district employees who opined that the child possessing marijuana at school was not a manifestation of his ADHD disability. They know this young man and testified favorably about him in many instances. Diane Stark has never met the child and her testimony alone does not convince this Court that the child's conduct on February 25, 2004 is a manifestation of his ADHD disability. Dr. Jackson does not testify that the behavior is a manifestation of the ADHD disability but that said behavior is more of a substance disorder.

### CONCLUSION

The Court is mindful that the aforementioned cases provided by the two able attorneys litigating this matter are not controlling. However, the opinions provide reasoning and rationale helpful relative to the manifestation issue considering the child's ADHD disability. The school district should not believe or read into this opinion that if a


ADHD child or IDEA student possesses illegal drugs at school, it cannot be considered a manifestation of the child's disability. An argument could easily be made in various factual situations that the child's behavior (possessing drugs) is in fact a manifestation of an IDEA disability. The Court can visualize an ADHD student in the bathroom, locker room, hallway, or other darkened area when another student gives drugs to the unsuspecting ADHD student. Without thinking, the ADHD child takes possession of the contraband. Immediately upon taking possession of the drugs a school official notices the behavior and catches the students involved. In that circumstance and other possible situations, the child's behavior could be considered a manifestation of his disability.

In this case, the child provided marijuana from another student on February 25, 2004 at school. He kept the marijuana on his person for an unknown period of time on that date. With only a few minutes left before the end of the school day, school officials received information that this child was possessing marijuana. Upon receipt of that information officials conducted a search of the child and he advised that he bought the marijuana for his older brother. It was an extremely poor choice, but it was calculated. The child knew that possessing marijuana was a serious offense. It is impossible to imagine that the child did not know that possessing drugs at school was a zero tolerance offense. During the 2003-2004 school year, this was the only drug offense incident at Goodlettsville Middle School.

The evidence preponderates in favor of the school district. Therefore, the school district is the prevailing party.

IT IS SO ORDERED.

ENTERED THIS THE 28 DAY OF SEPTEMBER 2004.

  
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**THOMAS JAY MARTIN, JR., #13877**  
Administrative Law Judge  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing Final Order has been placed in the U.S. Mail postage pre-paid to Ms. Mary E. Johnston, 204 Metropolitan Courthouse, Nashville, TN 37201, and Mr. Alex J. Hurder, Vanderbilt Law School, 131 21<sup>st</sup> Avenue South, Ste. 119, Nashville, TN 37203-1181, on this the 28<sup>th</sup> day of September 2004.

  
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Thomas Jay Martin, Jr.